

case of dispute regarding a julkur right, or a case of dispute for possession of land covered with water. If it were a case of possession of land covered by water, and the right to fish was the ordinary right of a person who owned the land, clearly the Magistrate would have jurisdiction. On the other hand, if what he has decided was merely the right to fish and nothing more, the cases in this Court go to show that the Magistrate could not decide the case. Therefore, as I have already said, what we have to decide is, whether the Magistrate tried this as a case for possession of land covered with water, or simply as a dispute about the right to fish.

The Magistrate says: "I do decide and declare that she is in possession of the said fishery from G. to H." * * * *; and there is nothing to show that the Magistrate tried this case as for possession of land covered with water.

That being so, we must set aside the order of the Deputy Magistrate.

Order set aside.

P. O'K.

PRIVY COUNCIL.

DHARANI KANT LAHIRI CHOWDHURY (PLAINTIFF) v. KRISTO KUMARI CHOWDHURANI AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

P. C *
1886
February
7 & 18.
March 6.

Benami transaction.—Purchase in the name of Hindu wife.

The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate, was for herself, or for her husband, her name being used *benami* for him.

The High Court, at the hearing in appeal, considered certain previous decisions in cases arising out of *benami* transactions. But in arriving at its conclusion, which was that the property was the wife's, it proceeded entirely on the evidence in the particular case. The judgment of the Judicial Committee, which also went upon the evidence, was, on the contrary, that the husband was, in fact, the purchaser, the purchase being *benami*, in his wife's name.

* *Present*: LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR R. COUCH.

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APPEAL from a decree (6th February 1882) of the High Court (1), reversing a decree (9th April 1880) of the Subordinate Judge of Mymensingh.

The decree of the High Court, against which this appeal was preferred, had the effect of maintaining the title of the principal defendant, Srimati Chowdhrani, in a three gundas share in zemindari lands in Pergunnah Sherpur, Zillah Mymensingh. She died pending this appeal; the respondents, who were entitled to any interest in the property that she might have, being substituted for her, under an order in Council of 22nd March 1884.

The object of the suit was to obtain a declaration of proprietary title (subject to an outstanding mortgage on part of the property), in the plaintiff to a three gundas share in the estate above named, formerly belonging to Goluck Nath Chowdhry, husband of Srimati Chowdhrani, the defendant. The plaintiff claimed as purchaser at an execution sale on 6th September 1871, at which sale he bought the right, title, and interest of Goluck Nath in a twelve annas share in the land. It was the plaintiff's case that such share included the three gundas share in suit, although the latter stood in the name of Srimati Chowdhrani, wife of Goluck Nath, having been bought in by him at the sale, and the conveyance taken in his wife's name.

The defendant Srimati Chowdhrani contended that she had, out of her own funds, purchased the three gundas share on the 9th of June 1842, when her husband's interest therein was sold at the suit of Government, in discharge of certain liabilities under which he had come.

The Subordinate Judge was of opinion that Goluck Nath had furnished the money for the purchase, using his wife's name for taking the conveyance, *benami*, for himself; and that he had afterwards remained in possession. He found that Srimati Chowdhrani was without funds of her own wherewith to make the purchase.

On appeal, the High Court (McDONELL and FIELD, JJ.) found that the evidence was in favor of there having been an actual purchase on behalf of Srimati Chowdhrani. The judgment,

(1) I. L. R., 8 Calc., 545; *Chowdhrani v. Tarini Kant Lahiri Chowdhry*.

which is reported in the volume of these reports for 1882 (1) refers to the decisions on the subject of the presumptions, said to have arisen in cases somewhat analogous. The Court declined to recognise any rule that, in the absence of evidence showing the source of the purchase-money, there was a presumption that property purchased by a Hindu wife had been acquired with her husband's money. The question at issue was decided entirely upon the evidence in the particular case, and the judgment of the Court of first instance was reversed.

On this appeal,—

Mr. T. H. Cowie, Q.C., and Mr. R. V. Doyne, appeared for the appellant.

Mr. H. Cowell for the respondent.

Reference was made to *Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty* (2); *Raja Chunder Nath Roy v. Ramjai Mazumdar* (3), in regard to the burden of proof, and the presumptions arising from the position of the parties.

On a subsequent day, 6th March, their Lordships' judgment was delivered by

SIR R. COUCH.—At a sale on the 6th of September 1871, in execution of a decree against one Goluck Nath Chowdhry, the original appellant, Tarini Kant Lahiri Chowdhry, who has died during this appeal, became the purchaser, for Rs. 61,100, of whatever right, title, and interest Goluck Nath had in 12 gundas out of a share of 1 anna 15 gundas of the zemindary No. 144 of Pergunnah Sherpur in the Zillah Mymensingh, and received the sale certificate of the Court, dated the 30th November 1871. It does not appear that he took any steps upon this purchase to obtain registration of his name, but upon Srimati Chowdhry, the widow of Goluck Nath (he having died in the meantime), making an application, under Bengal Act VII of 1876, to the Deputy Collector of Mymensingh to have her name registered in respect of the three gundas share of the 1 anna 15 gundas, he objected, on the ground that she had no share in the estate, and was not

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(2) 11 Moore's I. A., 28.

(3) 6 B. L. R., 303.

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entitled to registration. The title of Srimati Chowdhrani was said to be founded on a purchase by her, at a sale on the 9th of June 1842, of the three gundas share, part of 12 gundas, of which her husband Goluck Nath was then the proprietor, by the Collector of Mymensingh, in satisfaction of a claim of the Government against Goluck Nath as surety for one Jugal Kishore Sen, who was employed in the Mymensingh Collectorate. The appellant contended that this purchase was a *benami* transaction, and that Goluck Nath was the real owner of the three gundas when the sale to him was made. The Deputy Collector rightly refrained from deciding that question. He found that Srimati, subsequently to her purchase, obtained registration of her name as proprietress jointly with the other proprietors, but did not find the date of it more precisely. He found that the *ijardar*, who will be referred to afterwards, was in possession for her, and that her name was in the previous register of proprietors, and ordered her to be registered as proprietress of what he described as equivalent to the three gundas share. This order was made on the 28th February 1878, and in consequence of it the present suit was instituted, on the 27th of February 1879, by the appellant against Srimati and her son Hurro Coomar Chowdhry. The plaint prayed that the plaintiff's title to the three gundas might be declared, and his name be directed to be registered in respect thereof. The written statement of Srimati stated that she made the purchase *bonâ fide*, and really for herself, with the money of her own funds and own *stridhan*.

Goluck Nath was the son of Rama Nath, one of five brothers, each of whom had a share of six gundas in the estate. On the death of Rama Nath, Goluck Nath became entitled to his six gundas. He afterwards inherited the six gundas of one of his uncles, and, being thus entitled to twelve gundas, became surety for Jugal Kishore Sen, and pledged one-fourth of his then share in the property. This fourth was the three gundas sold on the 9th of June 1842. Subsequently Goluck Nath inherited the share of another uncle, and he then sold a twelve-gunda share to one Shib Dyal Tewari, and, upon the same date, he and his wife Srimati executed, in favour of Shib Dyal Tewari, an *ijara*, or usufructuary mortgage, of a further six

gundas share for the period of 26 years. The date of this ijara is the 6th December 1859. Its not having expired when the suit was brought is the reason that the plaintiff prayed for a declaration of title only and not for possession. After this sale and mortgage Goluck Nath inherited the share of another uncle, and thus, at the time of the execution sale in September 1871, there were twelve gundas, of which Goluck Nath was clearly entitled to nine, and the remaining three are the subject of the present suit.

The certificate of the sale on the 9th of June 1842 states that the property was purchased by Doorga Pershad Roy, the mookhtar of Srimati Chowdhvani, of Girda, in Pergunnah Sherpur, for the sum of Rs. 560; and that on payment of the earnest money a proceeding was passed by the Dacca Commissioner, on the 15th July 1842, sanctioning the sale, and thereupon the said purchaser paid the whole amount of the purchase-money into the public treasury. The evidence for the plaintiff was that Doorga Pershad Roy, who had died before the trial, was the servant of Goluck Nath and served him as naib, and was said by Hurro Coomar Chowdhry not to have been his mother's servant before the sale; that the earnest money, about 100 or 125 rupees, was paid to Doorga Pershad by Goluck Nath, that Goluck Nath paid the purchase-money, and borrowed it from Madari Lal Bajpai and gave a bond for it. Madari Lal, who was living, and was said to have a house in Rae Bareilly, was not called. A witness also deposed that Nobo Coomar Chowdhry, a cousin of Goluck Nath, who was present at the sale and purchased other properties, told Goluck Nath to keep this property. There were several sureties whose property was sold at the same time. The evidence of Srimati herself, who was examined as a witness, was that Doorga Pershad Roy purchased for her, and she paid the purchase-money; that she gave him Rs. 1,000 out of Rs. 3,000 which she had from presents on the occasion of her marriage and money her mother-in-law left her. She said that she did not tell her husband anything about the auction sale; she did not tell him she would purchase the property, and he did not tell her anything about the purchase of that property. She was about 23 or 24 years of age when her mother-in-law died, which was about a year

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before. She was supported in this account of the transaction by two of her witnesses. The Subordinate Judge, a Hindu, who found that the purchase was a *benami* one, said it was unlikely and incredible that she, a purdah-nashin lady in a Hindu family, and the wife of a respectable zemindar, should herself bring the money and give it to an officer; that there should have been one or two unconnected persons present, and that they witnessed that fact. The High Court, on the contrary, were of opinion that the story told by the plaintiffs witnesses of the manner in which Goluck Nath supplied the money with which the purchase was made was "not in itself a very credible one," and they said that the impression which the evidence left upon their minds was that Srimati had funds of her own, and that with a portion of these funds this share in the property was purchased. In this conflict of opinions their Lordships are disposed to prefer that, of the Subordinate Judge, who saw the witnesses, and would be better acquainted with the habits of Hindu ladies than the Judges of the High Court could be.

There is, however, an important fact which the High Court does not appear to have noticed. It has been seen that the sum paid for the three gundas was Rs. 560. Srimati in her deposition said that the income of the property purchased by her at the auction sale would be Rs. 700 or 800 a year, exclusive of the sudder rent. The defendants put in evidence an attested copy of a bond, dated the 21st of February 1855, by which Srimati mortgaged to Shib Dyal Tewari one gunda out of the three for a loan of Rs. 4,500, stated to be taken by Goluck Nath and herself. This would give to the three gundas at that time a mortgage value of Rs. 13,500. It appears to their Lordships that this mortgage is also some evidence that Goluck Nath was the real owner.

On the 30th March 1855 Shib Dyal Tewari obtained a decree upon this bond against Goluck Nath and Srimati for Rs. 4,936 for principal, interest, and costs. On the 12th of November 1859, Srimati executed a *mookhtarnama*, in which it is stated that having received Rs. 7,795, inclusive of costs and interest due to Shib Dyal Tewari on this decree, and Rs. 26,205 in cash for payment of the debts of other creditors, she appointed her son,

Hurro Coomar Chowdhry, mookhtar, on her behalf for the purpose of granting a temporary ijara, together with her husband, to the said Tewari, of her three gundas, and three out of the six obtained by her husband by right of inheritance from his uncle, Gopinath Chowdhry, at an annual rental of Rs. 1,760 14 annas. This shows a value of the three gundas slightly in excess of that before given. The ijara was executed accordingly, and is dated the 16th December 1859, there being to it a schedule of nankar lands which were excluded from it. There is no evidence what the debts of other creditors were, whether of Goluck Nath or of Srimati. Their Lordships think it is improbable that if Srimati had become the owner of the three gundas as her *stridhan*, and had incurred debts which had to be paid by borrowing money, she would not have made a separate mortgage of her three gundas. If she were not a benamidar the transaction is a singular one; if she were, it is explicable. It seems more probable that the debts were Goluck Nath's, and Srimati joined in the mortgage because she was the apparent owner. The difference between the price paid for the three gundas in 1842 and the value is very significant. There is no evidence of what happened at the sale, what biddings there were, or how the property came to be sold for so small a sum. It appears to their Lordships incredible that Goluck Nath allowed this, which was a fourth of the ancestral property he then had, to be purchased by his wife on her own account, and to become her *stridhan*, with the incidents belonging to such property.

As to the evidence of possession, the registry of Srimati's name, whenever it took place, is of no value, as it would follow the sale certificate; and rent suits would be properly brought in her name jointly with Goluck Nath, as was done in the suit, the decree in which is in the record. The witnesses to possession cannot be relied upon. The Subordinate Judge said that the evidence of some of the defendant's witnesses with regard to this was clearly tutored and false, and the High Court say they think there is as good evidence on one side as on the other.

It was argued for the respondents that the appellant claimed to be registered for the first time in February 1878, and that he might have taken proceedings with regard

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to the nankar lands before then. It does not appear that he could have been registered separately for those lands. The point was not taken in the lower Courts, where an explanation of his not doing so might have been given. As to the six gundas included in the ijara, it is clear, from the judgment of the Deputy Collector before noticed, that a claim to be registered in respect of those would have been unsuccessful. In fact, the appellant did not, in February 1878, claim to be registered. He only objected that Srimati was not entitled to registration. She admitted in her evidence that he was in possession of the other six gundas, but whether his name had been registered in respect of them did not appear.

Their Lordships have not been unmindful that this is an inquiry into the nature of a transaction which took place so far back as 1842, but until the appellant's purchase no occasion had arisen for the inquiry. There was not any opposition of interests between Goluck Nath and his wife, and the appellant brought his suit without substantial delay after he found his title challenged. Moreover, though some evidence has been lost which might have been material, there still exists one of the co-sureties, and what is more important Srimati herself was living, who, if her story be true, was the leading actor in the acquisition of the property by herself.

Their Lordships have to decide between the conflicting decisions of the lower Courts on a question of fact. They think the reasons given by the High Court for its decision are not satisfactory, and their consideration of the evidence in the case has brought them to the same conclusion as the Subordinate Judge. They will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to decree that the appeal to that Court be dismissed with costs. The respondent will pay the costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

C. B.